UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

GLORIA WINDLE, Plaintiff, vs. JOHN MORRELL & CO., a Delaware corporation, Defendant.	No. **C01-4068-MWB** **ORDER ON MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT**

On February 5, 2003, the plaintiff filed a motion (Doc. No. 50) for leave to amend her complaint to add an allegation that her claims in this action are being asserted under both the Iowa Civil Rights Act and federal law. (*See* Count IV of the Amended Complaint, Doc. No. 59) By order entered February 11, 2003 (Doc. No. 58), the court granted the motion and directed the Clerk of Court to file the amended complaint. On February 13, 2003, the plaintiff filed a motion for leave to file a second amended complaint (Doc. No. 64), to specify that her claim for racial harassment in Count II of the amended complaint[1] is being asserted under both 42 U.S.C. § 1981, and Title VII of the Civil Rights Act of 1964. On February 14, 2003, the court held a hearing on the motion,[2]

[1]Count II of the original complaint and Count II of the amended complaint are identical.

[2]In the motion for leave to file a second amended complaint (Doc. No. 64). the plaintiff also requested an expedited hearing. This request was **granted**.

and on February 15, 2003, via e-mail, the court received the defendant's resistance to the motion. The court is now prepared to rule on the motion.

In Count II of the amended complaint, the plaintiff alleges the following:

> **RACIAL HARASSMENT**
>
> 22. Plaintiff repleads paragraphs 1-21 above.
>
> 23. Huffstetler has called Plaintiff a "fucking Mexican" and other racially derogatory names.
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> 24. Huffstetler harasses and treats Mexican women differently than other women, including Plaintiff Windle.
>
> WHEREFORE, Plaintiff WINDLE prays that the court enter judgement against the Defendants, declaring the conduct engaged in by the Defendants to be in violation of the Plaintiff's rights and award damages as follows:
>
> * * *

(Doc. No. 59) Count II of the proposed second amended complaint is identical to Count II of the amended complaint, except the title has the following additional language (underlined and italicized):

> **RACIAL HARASSMENT**
> ***PURSUANT TO 42 U.S.C. 1981 AND***
> ***TITLE VII OF THE CIVIL RIGHTS ACT OF 1964***

The only other change from the amended complaint to the proposed second amended complaint is the addition of a citation to "42 U.S.C. 1981" in paragraph 1, the "jurisdictional allegation."[3]

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[3]The proposed additional language is underlined and shown in italics, as follows:

> 1. This action is based on the provisions of 42 U.S.C. Section 2000e, *et seq.*, commonly referred to as the Civil Rights

The plaintiff asserts that the language added in the proposed second amended complaint "is necessary to clarify whether or not her claim is for 'race discrimination,' which implicates 42 U.S.C. 1981 as well as Title VII, or 'national origin' discrimination, which would involve Title VII only." (Doc. No. 65, p. 1) As authority for the right of the plaintiff, as a Mexican-American,[4] to bring a claim under section 1981, the plaintiff directs the court to *St. Francis College v. Al-Khazraji,* 481 U.S. 604, 613, 107 S. Ct. 2022, 95 L. Ed. 2d 582 (1987), in which the Supreme court held that Congress intended section 1981 to protect "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." The plaintiff asserts she "has all along classified her claim as a 'race' claim, not a 'national origin' claim," and she argues it would be an abuse of discretion for the court to deny the motion to amend.[5] (Doc. No. 65, p. 1)

The defendant responds by asserting that Mexicans and Mexican-Americans are not entitled to assert a claim under section 1981. (*See* defendant's resistance to motion to amend, p. 2) As support for this assertion, the defendant cites a footnote in *Valdez v. Mercy Hospital*, 961 F.2d 1401, 1402 n.2 (8th Cir. 1992), in which the Eighth Circuit

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> Act of 1964 and all amendments thereto***, and 42 U.S.C. 1981***. Subject matter jurisdiction is conferred upon this court by 42 U.S.C. Section 2000e-5(f). The court has supplemental jurisdiction over Plaintiff Windle's state law claims pursuant to 28 U.S.C. Section 1367.

[4]At the hearing, the defendant offered into evidence a copy of the plaintiff's application for employment with the defendant on which she classified herself as "White." The plaintiff's attorney responded that although the plaintiff is a native-born citizen of the United States, she is of Mexican ancestry and heritage, and in fact, speaks English with an Hispanic accent.

[5]The plaintiff asserts the addition of section 1981 as a jurisdictional basis is only for the purpose of avoiding the $300,000 cap in Title VII actions. (*See* Doc. No. 65, p. 1)

Court of Appeals noted: "Although Valdez refers in his brief to his claims of 'race discrimination,' we will presume that as a Mexican-American he actually is claiming discrimination based on his national origin. 42 U.S.C. § 2000e-2(a) (1988). 'Mexican' and 'Mexican-American' are no more descriptive of race than is the term 'American.'"

Title 42 U.S.C. § 1981 is a deceptively simple statute. The statute provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

On its face, the statute makes no mention of "race," but the statute has been construed to proscribe racial discrimination, as opposed to other forms of discrimination. In *Saint Francis College*, the plaintiff claimed his employer discriminated against him because he was of Arabian descent. The Supreme Court noted that "[a]lthough § 1981 does not itself use the word 'race,' the Court has construed the section to forbid all 'racial' discrimination in the making of private as well as public contracts." *Id.*, 481 U.S. at 609, 107 S. Ct. at 2026 (citing *Runyon v. McCrary,* 427 U.S. 160, 168, 174-175, 96 S. Ct. 2586, 2593, 2596-2597, 49 L. Ed. 2d 415 (1976)). The Court in *Saint Francis College* then discussed what "discrimination based on 'race'" means in the context of section 1981.

The Court noted that "race" was a far different concept in the middle years of the 19th century, when section 1981 was enacted, than it is today. For example, 19th century references to the "Caucasian race" were to people of European ancestry, not to all people who would be considered "white" by today's definition. In reviewing the "identifiable classes of persons" who were considered as members of different races in the 19th century,

the court referenced Arabs, Englishmen, Germans, Scandinavians, Chinese, Anglo-Saxons, Jews, Blacks, Mongolians, and, significant to the present case, Mexicans. *See id.*, 481 U.S. at 612, 107 S. Ct. at 2028. After reviewing 19th century dictionaries and encyclopedic sources, and the congressional history of the act, the Court concluded as follows:

> [W]e have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory.

Id., 481 U.S. at 613, 107 S. Ct. at 2028.

Courts that have addressed this issue have since *Saint Francis College* have afforded rights under section 1981 to numerous classes of persons, including persons of Mexican descent. *See, e.g., Pavon v. Swift Transp. Co.,Inc.*, 192 F.3d 902, 908 (9th Cir. 1999) (§ 1981 claim appropriate where co-worker subjected Mexican plaintiff to discrimination because co-worker "considered [the plaintiff] to be of a different race than himself"); *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987) (§ 1981 claim could be asserted by persons of Puerto Rican descent); *Zapata v. IBP, Inc.*, 19 F. Supp. 2d 1215, 1218-19 (D. Kan. 1998) (facts pled by a Mexican plaintiff under Fed. R. Civ. P. 8(a) were sufficient to support claim of race discrimination under § 1981, even where racial discrimination not specifically pled in complaint); *Rodriguez v. Beechmont Bus Service, Inc.*, 173 F. Supp. 2d 139, 146 (S.D.N.Y. 2001) (with respect to Hispanic employee, although § 1981 does not prohibit discrimination based on the employee's national origin, it does protect the employee from racial discrimination); *see also*, *Shaare Tefila*

Congregation v. Cobb, 481 U.S. 615, 107 S. Ct. 2019, 95 L. Ed. 2d 594 (1987) (Jews were considered a separate race when 42 U.S.C. § 1982 was enacted).

The defendant relies heavily on footnote 2 in the *Valdez* case, quoted above. This is the only reported statement the court could locate that suggests a Mexican or Mexican-American cannot assert a claim of race discrimination under section 1981. The statement is significant in the present case only because it appears in an opinion from the Eighth Circuit Court of Appeals. However, in *Valdez*, the court was considering an appeal from a judgment in favor of the defendant after a bench trial. In the footnote, the court commented, in what was clearly dicta, that it would presume the plaintiff's claim was based on Title VII even though the plaintiff referred in his brief to his claims of "race discrimination." Although the court, in passing, noted that "Mexican" and "Mexican-American" are not descriptive of race, the court did not reference *Saint Francis College* or the 19th century concepts of race discussed by the Supreme Court in that case. The court does not find Valdez to be supportive of the defendant's position in this case.

Finally, the defendant argues the addition of references to section 1981 in the proposed second amended complaint would significantly change its preparations for trial, and would warrant a continuation of the trial, which is currently scheduled for March 3, 2003. The court does not agree. The only impact of the proposed amendment on this case would be to increase the potential judgment that could be entered on Count II. Nothing else would be changed. From the beginning of this case, the plaintiff has always asserted she was subjected to harassment because of her "race" as a Mexican-American. By now, the defendant certainly should be prepared to present its defense to this claim, regardless of the jurisdictional basis for the claim. Accordingly, the court finds the plaintiff's motion should be granted. *See Kim v. Nash Finch Co.*, 123 F.3d 1046, 1062-64 (8th Cir. 1997)

(Title VII and § 1981 claims are substantially identical, and district court abused its discretion in denying post-trial motion to amend pleading).

For the reasons discussed above, the motion for leave to file a second amended complaint (Doc. No. 64) is **granted**, and the Clerk of Court is directed to file the Second Amended Complaint submitted with the motion.

IT IS SO ORDERED.

DATED this 17th day of February, 2003.

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PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT